

Of Dreams, Nightmares, and a Little Bit of Hope

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What comes After Neoliberalism?

The response to [Poul F. Kjaer's](#) recent edited collection on *The Law of Political Economy* (CUP 2020) must be a sense of wonder. One reason for this is that it comes so directly and un-self-consciously to its point, which is to show in so many ways (fourteen in all, plus a mighty introductory section by the editor) how law has, to paraphrase one of the contributors (David Kennedy), got us into this mess as well as how it might get us out of it. The 'mess' is, of course, the current neoliberal world order and its many fallouts, amongst which are those lingering structural inequalities that focus the contemporary debate on questions of identity, positionality, and privilege. The latter are not, however, the primary objects of this collection which is more interested in their root causes in the political economy of late modern capitalism than in their ethical or political consequences.

In that sense, the analyses brought together in this volume are squarely situated in that long-standing tradition that aspires to combine a 'scientific' (though decidedly not scientific) dissection of modern society with its critique. It is an approach that has, of course, lately come under attack from some sectors of the contemporary intellectual scene, overtly for being 'Eurocentric' though actually for insisting on the continued relevance of trying to understand the deepest structural components of (modern) societies across and beyond their concrete instantiations in different social categories or places. Yet, that is what makes this collection so remarkable a contribution to the contemporary debate, notably the tangible sense of urgency that transpires from each chapter that we must focus on the political economy if we want to transcend epistemic fragmentation and regain the initiative –not least from the populist right- on conceiving alternatives to the neoliberal hegemony.

However, the book does more than insist on this point or engage in a narrow description of the functioning of 'the' political economy. Typically for a contribution concocted by academic lawyers, it does not let itself be limited by any disciplinary or methodological confines, as is all too common in, for instance, economic treatments of political economy even of the heterodox kind. Instead, the book broaches many of the deepest questions underlying the 'law of political economy', whether legal, political, economic, or philosophical. All of these merit engagement, though I shall, in the following, merely highlight three overarching (and interrelated) themes that touch on particularly contested and contestable issues.

Law as the (Empty) Master (Re-)Signifier of the Political Economy?

If there is one common if, perhaps, unsurprising thread in all contributions to this book, it is the affirmation that law is not just the epiphenomenal product of an underlying political economy, nor a mere handmaiden of capitalist reproduction, but a central, perhaps *the* central, element in it. All authors go out of their way to not merely foreground law's role in the political economy but to, essentially, argue that the latter's analysis should really be (or become) legal analysis. Yet, despite this *unisono* pledge of allegiance to law's empire, starkly contrasting visions of that empire emerge from the different chapters.

Take, for instance, Poul Kjaer's programmatic affirmation that

'if one functional system takes up an overarching position in society, in the sense that it has a strategic position which enables it to serve as the central framework for the integration of society, it is therefore the legal system, and not the political or the economic system.' (p. 12)

And contrast it to Duncan Kennedy's quip that

'it is commonsense among legal theorists today that law in liberal democratic post-industrial welfare capitalism is neither mere superstructure nor autonomous' (p. 122).

While Duncan Kennedy's – possibly inadvertent – allusion to the Copenhagen interpretation of quantum mechanics (atoms are, complementarily, both particles and waves) may speak to the contemporary penchant for hybridity, the positions in the volume are actually quite divided.

On one side are what might be termed the 'systems thinkers', mostly post-Luhmannian autopoietists or those groomed in this perspective and (broadly) sympathetic to aspects of it, for whom law is never just analytically but always also normatively autonomous. For them, we do not just misunderstand the functioning of the political economy if we consider law to be merely epiphenomenal to it, but most of the 'problems' that arise from political economy are actually attributable to an encroachment of law's autonomy, that is, to its colonization by political and economic logics. The bottom line is that if law is allowed to evolve as 'law' and, hence, unrestrained by the public/private divide (see, for instance, the chapters by Vallejo and Viechner) and the politico-economic impositions of 'governance' and 'constitutionalization' (see, for instance, the chapters by Mulder Guibboni), then it can become an instrument of change and emancipation from 'the system' (aka the dominant political economy); this is systems thinking mobilized against the system.

On the other side, however, stand authors who might broadly be labelled as 'problem thinkers' for whom law's ubiquity is precisely due to its use in, by and for political and economic interests. This does not make it epiphenomenal either, because law provides the basic matter from which politics and the economy are

constructed, but nor is it autonomous. It is, in a sense, always already polarized and, in turn, polarizes the social contexts which it structures in an ongoing process of juridification, judicialization, and constitutionalization. As such it cross-cuts the Marxian division and functions at once as base and (ideological) superstructure, mobilizing, as Duncan Kennedy masterfully demonstrates, a dialectic hermeneutic of suspicion and restoration to advance concrete interests and simultaneously obscure these under the cloak of 'the law'. Unlike the 'system thinkers', these authors tend to be (much) less optimistic about law's role in social transformation towards the end of neoliberalism and they show, in so many ways, that the strategic use of law for 'progressive' causes may well be underwritten by the functional logic of that very neoliberal political economy. To David Kennedy, the left liberal dream of law as 'a kind of ersatz global sovereign or reassuring father, at once problem solver and ethical lodestar' (p. 137) is, in truth, a nightmare, and what remains once we wake up is a [world of struggle](#).

Lost Dreams and Growing Nightmares

This leads to another and closely connected theme, namely the changing substance of political economy as the stuff of nostalgic dreams or turbid nightmares. Many of the contributions sketch out the developmental curve of capitalism, or rather, a particular variety thereof during a particular reference period, in relation to law's transformation from liberal minimalism via ordo-social-democratic interventionism to manipulative governance managerialism. While these authors are careful not to display too openly a certain (old) left nostalgia for at least aspects of that intermediate paradigm, there is nonetheless a tangible longing for some of what it has come to stand for, most notably the idea of a proper (and, presumably, properly democratic) *government* that enacts a genuinely *public* interest (see, next to (David) Kennedy, for instance, the contributions by Christoudolidis, Feichtner, and Bartl).

Not coincidentally, given the intellectual trajectory of most contributors, it is a nostalgia that, perhaps, betrays a certain mindset (temperamentally) associated with especially New Deal America and the German Bonn Republic, aptly summed up by yet another great observer of our times, [Perry Anderson](#) (who, were he a lawyer, could well have been part of this volume):

'if Habermas told his readers that things could be as they should be – and, under the protection of the *Grundgesetz*, mostly were – Luhmann's message was dryer, but no less reassuring: things were as they had to be.'

While not a perfect representation of the actual world, it still left room for development and some dreaming.

That whole project was, of course, subsequently wrecked by the (neo)liberal bullies articulating capital's unilateral cancellation of the post-War consensus and the expert technicians of governance they brought along. The rage against especially these operators of managerialism, most of whom were and are lawyers, is another common thread that connects many of the pieces in this volume. They are 'the elite's' handmaidens and, thereby, form an elite class of their own, not least on

account of their exclusionary command of the primary idiom of power: the law, which, as Jay Ellis demonstrates in relation to climate change, even enters the constitution of scientific knowledge (p. 184).

‘There is the Truth: On Your Knees Before It’

This, then, provides the transition to a yet broader concern that reverberates through the volume, notably the state and future of critical theory in times of post-factual politics. For it seems that the critical thinkers here assembled –and they are, despite their evident divergences, all critical in their own way – have reached the very limits of immanent critique (on ‘critical legal studies’ in this context see the contribution by Micklitz).

One such limit is the law itself, whose co-constitution of both the politics and economics of capitalism is here revealed with such glaring (though never polemic) clarity that little seems to remain, either to say or to do. There is a certain hermeticism in these accounts which even the attempts to find some wiggle room in the interstices of a thoroughly juridified political economy through concepts such as [serial law](#) (Ladeur) or [counter-rights](#) (Teubner) cannot quite temper.

The second limit here reached, is, thus, epistemic certainty, not of the essentialist kind but of the sort that would provide some vantage point of and for critique itself. Instead, the scenario that emerges is, to return to the quantum physical metaphor, one of structural uncertainty on account of which we cannot ever fully determine where we are at any one moment. The realization of this near complete self-reflexivization of critique can result in a strange sense of self-contradiction, as is evidenced in Joerges and Everson’s cryptic (or crypto-libertarian? surely not!) admission that

‘we find ourselves embarrassed by our own residual demand for doctrine within our rule of law. Legality does matter. Liberal impulses retain their status as bulwark against the undue exercise of power, or, in the Hayekian twist, gain potency in repelling the more systemic imposition of scientism, and the empty utilitarian promises of certainty’ (p. 60).

How it Ends....

The question that really comes out of this remarkable volume is, then, not what comes after neoliberalism but how it can end and what role, if any, law might play in this. In his introductory reflection, Poul Kjaer connects different visions of political economy to the epistemological dichotomy between holism and differentiation. However, contrary to what one might expect, those contributions close(er) to ‘systems thinking’ tend to place what hope they dare articulate in the subversive potential of legal evolution through a continuous cycle of differentiation and self-reproduction.

The 'problem thinkers', in turn, concentrate on outlining the consequences of the loss of any holistic promise of law and end up pointing to the inevitability of struggle on different terms and grounds. Yet, both camps remain curiously wedded to a vision of social transformation that relies on some form of cognitive control, whether in terms of the not to be disturbed *Eigenrationalität* of systems (Teubner and Ladeur), or the revolutionary agency of 'people of good heart' (David Kennedy, p. 151). But, as, again, Jay Ellis' contribution highlights, on the level of the earth system, of which we, our law, and our political economy are now a part, complexity is so great that causality is non-linear and order is always on the edge of chaos. Everything we do, in the right or in false consciousness and with desired or unintended consequences, is an element of this highly time-dynamic process. We do not control its outcome, but we are bound to take part in it and we can do so in the realistic hope that things are on the move and that our cumulative 'irritations' may well tip the scales.

